United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 28, 2003

TO: Elizabeth Kinney, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rock and Soil Drilling Corp.
Case 13-CA-40480-1

524-0133-7500
524-5012-4000
524-6740-5000
524-8390-8600
524-8390-8650
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The Region submitted this Section 8(a)(3) "salting" case for advice as to whether the Employer unlawfully refused to consider for hire and/or hire paid union organizer employee applicants.

We conclude that the Employer unlawfully refused to consider and hire the Union organizers because they were qualified and antiunion animus contributed to the Employer's admitted refusal to consider or hire them, establishing prima facie evidence of both violations. Although the Employer asserts several defenses which would be valid if proven, the Employer has been unwilling or unable to adduce evidence affirmatively establishing these defenses.

FACTS

The Employer, Rock and Soil Drilling Corp, is a ground drilling company employing approximately 8 to 10 employees. After the Union's filing of an election petition on April 8, 2002, four paid Union organizer's applied for employment with the Employer, but were never hired.

During the morning of April 12, union adherent Todd Vandermyde entered the Rock and Soil office, without identifying himself as a union organizer, stated he had previously seen a help wanted sign in the yard, and asked if the Company was still hiring. The receptionist said "yes" and gave Vandermyde an application to complete. After Vandermyde completed the application, he asked how long the company kept the applications. The receptionist responded, "for a while." Before leaving, Vandermyde mentioned that he had some friends who were job-hunting, and asked if it would be all right if they too submitted applications. The receptionist said "yes" and Vandermyde left.

Within minutes, three additional union organizers, wearing union buttons and hats, entered the Employer's office to apply for work. Rita Shugar, the Company president, entered the reception area to determine the applicants' intentions. One of the applicants explained that they were interested in the driller/helper position but would take whatever positions were available at whatever pay was being offered. He also explained that after being hired, they planned to organize the employees on non-work time. Shugar explained to them that Rock and Soil was a non-union company. She then instructed the receptionist to provide applications to the three men explaining, "we have to give them applications." The three men completed and submitted the applications. When asked how long the applications would be kept by the Company, the receptionist replied, "for about a year." The union organizers were never again contacted about their applications.

Pursuant to the petition filed on April 8th noted above, an election was held on June 19th. On the eve of the election, a Company supervisor urged an employee to vote "no" so that the Company could be around for his children.[1] On June 19, 2002, the Union won the representation election by a vote of 4 to 3. The Union was certified on July 5, 2002.

From July 25 through July 31, and again from August 17 through August 25, the Employer advertised for the driller/helper position in several local newspapers. There is no dispute that the Union organizer applicants were qualified for these positions. Two other individuals were hired, one on August 12 and the other on August 26. The applications for the individuals actually hired contained a preprinted notation which reads: "Please Note: Your application will be kept on file for one month from today's date." The Union organizer application forms did not contain this notation.

The Employer contends that it was not hiring at the time the Union organizers submitted their applications, and that when it is actively seeking applicants, it places help wanted ads in the newspaper. The Employer contends that no Union organizers sought employment in response to the July and August newspaper advertisements. The Employer admits that it failed to consider the April applications of the Union organizers, and states that they were stale. The Employer asserts that it does not consider applications more than 30 days old, since it believes that those applicants

[1] The Region has informed us that it is alleging this statement as a Section 8(a)(1) plant closing threat.

have most likely found another position. Despite its asserted 30-day rule for consideration of applications, Rock and Soil admits that it actually keeps employment applications in its files for at least one year as required by Title 7 of the Civil Rights Act.

The Employer defends against its failure to hire the Union organizers by asserting they do not otherwise meet Rock & Soil's requirements for employment because of the Employer's established practice of not hiring individuals that will not stay with the Company "long term." The Employer asserts that "in its experience," individuals with significantly higher wage histories, and individuals who are "overqualified" do not stay long. The Employer alternately asserts that it would not have hired the Union organizers because the Employer has a rule against hiring employees who work two jobs.

ACTION

The Employer's admitted failure to consider the Union organizers based on its 30-day employment application retention policy, violates Section 8(a)(3) of the Act, because the 30-day rule was discriminatorily implemented. The Employer's failure to hire these Union applicants for the August 2002 openings also violates Section 8(a)(3) of the Act, because the Union applicants were qualified, antiunion animus contributed to the Employer's decision not to hire, and the Employer has failed to show that it would not have hired the Union applicants absent their Union affiliation.

Under FES (A Division of Thermo Power), 331 NLRB 9 (2000), the General Counsel establishes prima facie evidence of a discriminatory refusal to consider for employment by showing that (1) the respondent excluded applicants from the hiring process; and (2) antiunion animus contributed to this decision. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The Employer admits that it did not consider the Union applicants for hire, but asserts that its reason for doing so was the application of a 30-day employee application retention policy. The Employer's admission, that it excluded the union organizers from the hiring process, satisfies the first prong of the General Counsel's burden under Thermo Power, above. Anti-union animus necessarily

contributed to that decision if the 30-day policy itself is unlawfully motivated.[2]

The Board has held that a discriminatory rule stating that applications for employment will remain active for only 30 days is unlawful.[3] If the purpose of the 30-day rule is to restrict employees from conducting protected activity such as "salting," the rule is discriminatorily motivated and unlawful. The Region found that the asserted 30-day rule, which only began to appear in written form after the union organizers appeared, was discriminatorily created to exclude union adherents from the hiring process because of their Union affiliation.

While the Region did not submit this issue, we note that the Region is on firm ground.[4] The Employer's assertion that it had always maintained 30-day policy, and that this was merely the first time it appeared in writing, is undermined by the statements of its receptionist that the Employer kept applications "for a while" and "for about a year." The rule thus first appeared, in written form, directly on the heels of the Union applications. This timing strongly supports a discriminatory motive which is reinforced by the Employer's contemporary statements indicating antiunion animus. The Company president told the applicants that the Employer is a non-union company. Her instruction to the receptionist that she nonetheless had to supply the "salts" with applications demonstrates a recognition that the Employer had to follow the appearance of non-discrimination. In this light, it can be inferred that the Employer created a written 30-day rule as a post-hoc rationalization to disguise its discriminatory purpose. Since the Employer has offered only this unlawful rule, and no other lawful basis for it conduct, the Employer's refusal to consider the Union applicants violated Section 8(a)(3).

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[2] Anti-union animus is also shown by the plant closing threat made in pre-election meeting, and by the Employer statements made to the applicants, i.e., "this is a non-union company" and "We have to give them applications."

[3] See, Masiongale Electric-Mechanical, Inc., 337 NLRB No. 4, slip op. pp. 1-2 (2001).

[4] See Niblock Excavating, Inc., 337 NLRB No. 5, slip op. at 8 (2001) (employer violated Section 8(a)(1) when it changed its policy of retaining applications from six months to only 30 days, close in time to an employer's failure to hire a union organizer, because the change was motivated by union activity.).

As to the Section 8(a)(3) refusal-to-hire allegation, to establish a prima facie case, the General Counsel must show:

> (1) that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements for the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.[5]

The burden then shifts to the respondent to show that, absent union activity or affiliation, it still would not have hired the applicants.[6]

We conclude that a prima facie case exists for an unlawful refusal to hire the Union organizers. The Employer failed to hire these organizers for then current openings; the organizers were qualified for those openings; and the failure to hire them was at least in part based on anti-union animus. The Employer asserts it would not have otherwise hired these individuals because of its past practice of not hiring people who will not stay with the Company "long term."

The Board has held that employer concern regarding employee retention and turnover may indeed be a valid defense to a failure to hire allegation where the employer has demonstrated that concern.[7] In 7UP of Cincinnati, supra,[8] the employer was able to demonstrate that it was experiencing large turnover in the position for which it was hiring, and that turnover was a concern to that employer. Here, the Employer merely asserts that it is concerned about employees not staying "long term." The Employer offers no evidence of a turnover problem or a history of concern about turnover.

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[5] Thermo Power, 331 NLRB slip op. at 4.

[6] Ibid.

[7] 7UP of Cincinnati, 337 NLRB No. 80 (May 12, 2002).

[8] Id. slip op. at 3.

Although the Board has found that employers may validly exclude individuals who are "overqualified" for the relevant positions, or whose salaries are "significantly higher" than the employer's salary where the employers' reliance on such criteria was affirmatively demonstrated, we find that the Employer here has failed to demonstrate either defense.

The Board has held that an employer may refuse to hire a union organizer applicant because that applicant is overqualified.[9] To establish such a defense, the employer must show that it has a genuine policy of not hiring overqualified individuals, and that it consistently applied that policy to the union organizers.[10] The only evidence proffered regarding the Employer's assertion that the Union-organizer applicants here were "overqualified," was a handwritten notation on three of 40 applications supplied by the Employer indicating these three applicants were "overqualified."[11] This evidence alone is insufficient to

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[9] Id., Hartman Bros. Heating & Air-Conditioning, 332 NLRB No. 142 slip op. p. 2 n. 9 (2000).

[10] See e.g., Hartman Bros. Heating & Air-Conditioning, supra, slip op. p. 6 (evidence established that employer had legitimate policy of hiring inexperienced employees so they could be trained its way. That policy was modified when it hired a somewhat more experienced employee who, unknown at the time, was a union organizer. The subsequent failure to hire an identified union salt with 26 years experience was lawful because he was much more experienced than the unknown "salt;" the failure to hire a second identified salt was unlawful because his experience was comparable to the unknown "salt."); Caruso Electric Corp., 332 NLRB No. 50 slip. op. at 6 (2000) (employer's assertion that it preferred totally inexperience workers rejected, where it adduced no evidence that it was hiring for entry level position, and where none of the union applicants was so overqualified that he would not have qualified for entry level position, and where employer's contention that it preferred inexperienced workers contradicted other stated policy of choosing experienced workers over inexperienced workers.); Colden Hills, Inc., 337 NLRB No. 86 (2002) (overqualified defense rejected when employer continued to interview union applicant after it knew he had extensive experienced and that his wage history was above employer's rates and after employer specifically asked if he would accept lower wages to which he responded in the affirmative. Moreover, the employer subsequently needed an experienced employee and hired another individual who had a comparably high salary to the union applicant.)

demonstrate that the Employer has a policy of not hiring overqualified applicants because the Employer has not explained how the individual applicants were rated as "overqualified" or how that rating played a role in the Employer's failure to hire these individuals. Since one application bears the designation "No" and was followed by the word "overqualified," the Employer arguably has shown that it did not hire that single applicant for that reason. However, the Employer has not shown that the remaining two "overqualified" employees were not hired because of their asserted over qualification. In fact, the Employer has not shown that it has a clearly defined standard for "overqualified."

The four applications of the Union organizers did not bear an "overqualified" designation. Moreover, a review of all the applications shows several individuals with qualifications comparable to both the Union organizers and to those applicants marked "overqualified." James T. Goltz, Kirk Coleman, and Thomas A. Pekny all made written applications evincing equivalent experience with the discriminates, yet their applications were not designated as "overqualified." In addition, applicant Mark Fischer had five years experience as an auto mechanic, similar to the experience of applicant Don Cinkus. Yet only Cinkus' application is marked as "overqualified." Finally, applicant Rich Brennan had comparable experience to the discriminatees and to those designated "overqualified." Bernnan also had received a B.S. in civil engineering (construction), yet he was not designated as "overqualified." In sum, the Employer has not shown that it had a defined "overqualified" standard that it consistently applied as a basis for rejecting applicants.

Concerning the Employer's wage compatibility defense, the Board has found that an employer may validly refuse to hire a union applicant where he would have to take a substantial pay cut from historical wage levels. However, the employer must affirmatively demonstrate that it has a policy of not hiring individuals who have a substantially higher wage history, and that it consistently applied that policy.[12]

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[11] The actual handwritten notations on the applications read as follows: app. Date, 1/3/01 "No overqualified;" app. Date 1/11/02 "Good but he may not stay;" app. Date 7/19/02 "Good he is overqualified." Only two of these applicants had applied prior to the date the discriminatees had applied.

[12] See e.g., Kelly Construction of Indiana, 333 NLRB No. 148, slip op. at 1 (2001) (isolated and marginal deviation from *proven* neutral policy of preferring employees who were

Although the Employer here has asserted that it has a wage requirement, it has adduced no evidence of that requirement. The employment applications have an entry for an applicant's prior wages and salary. The Employer also apparently obtained the current salaries of the Union organizers applicants from the Department of Labor. However, the Employer presented no evidence demonstrating that it considered certain wage levels to be incompatible with employment at its operation, nor any evidence that it refused to hire applicants because they possessed a history exceeding such wage levels. The Employer thus failed to meet its burden to show that it had a wage compatibility policy, and if it had such a policy that it applied it evenhandedly.

Finally, we conclude that the Employer's wage compatibility defense, even if demonstrated, would not carry its burden in this case, because it was inapplicable to the Union organizers. The defense is inapplicable because the Employer was well aware that these Union organizers were continuing their employment with the Union by, among other things, organizing this Employer during non-working hours. Thus, the Employer could have no real concern that the Union organizers would be dissatisfied with what, in effect, would only be a supplemental income.[13]

Lastly, the Employer asserts that it would not have hired the Union organizers because the Employer has a rule

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accustomed to the wages paid by employer, insufficient to negate defense to refusal to hire charge.); MicroMetl Corp., 333 NLRB No. 135, slip op. at 1, n. 1, 3 (2001) (*proven "across the board"* $10 per hour rule, i.e., employer did not interview applicants who had made more than $10 per hour in last job, valid employer defense to a refusal to hire charge when there was only one documented deviation from that policy.); J.O. Mory, Inc., 326 NLRB 604, 605 (employer demonstrated "legitimate" policy of not hiring individuals who made more than employer was currently paying, where employer declined to hire several non-union applicants for the same reason during same time period union organizers sought employment; General Counsel failed to establish a discriminatory motive by showing a single deviation from the established policy.)

[13] See Colden Hills, Inc., supra, slip op. at 7 ("Furthermore, Urquhart informed P. Kester that he would remain employed by the Union while working for Respondent, thereby undercutting any serious concern that he could not afford... to work at Respondent's wages.")

against employees' holding two jobs. We assume that such a rule would be valid if genuine and applied in a non-discriminatory manner. Here, beyond the Employer's mere assertion, there is absolutely no evidence of such a rule. The Employer thus again failed to meet its evidentiary burden.

In sum, we conclude that under Thermo Power, the General Counsel has established a prima facie case that the Employer unlawfully failed both to consider and to hire the Union organizers. The Employer has failed to carry its burden to show that, absent union activity or affiliation, it still would not have considered or hired these applicants. Although the Region provided the Employer with a full opportunity to present evidence, the Employer was either unwilling or unable to establish that (1) it had a non-discriminatory rule disqualifying applicants from consideration once their application had been on file longer than 30-days; (2) it had a genuine concern about employee turnover; (3) it had non-discriminatory policies setting requirements for over qualifications and wage compatibility, and uniformly applied those policies; and (4) it had a rule against employees working two jobs.[14] Therefore, the Region should issue complaint, absent settlement alleging that the Employer unlawfully failed to consider these union organizers for hire, and also lawfully failed to hire them.

B.J.K.

[14] Indeed, the lack of evidence to support any of these defenses strongly suggests that they are all post-hoc rationalizations and wholly pretextual.